

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

INTERNATIONAL BUSINESS MACHINES)
CORPORATION,)
)
Plaintiff,)
)
) C.A. No. 15-137-LPS-CJB
v.)
)
) **JURY TRIAL DEMANDED**
THE PRICELINE GROUP INC.,)
KAYAK SOFTWARE CORPORATION,)
OPENTABLE, INC., AND)
PRICELINE.COM LLC)
)
Defendants.)

**IBM'S MOTION FOR LEAVE TO FILE A SUR-REPLY
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff International Business Machines Corporation (“IBM”) respectfully moves the Court for leave to file a sur-reply (attached as Exhibit A) in response to Defendants’ Reply Brief In Support Of Defendants’ Motion To Dismiss (“Reply”). D.I. 25.

Pursuant to D. Del. LR 7.1.2, “[a] Court may grant leave to file a sur-reply if it responds to new evidence, facts, or arguments.” *St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Electronics Co.*, 291 F.R.D. 75, 80 (D. Del. 2013) (granting leave to file a sur-reply to address new arguments and newly cited case law).

Defendants’ Reply contains several new arguments. Most notably, Defendants propose an entirely new “brick and mortar” scenario for United States Patent No. 5,796,967 (“the ’967 patent”). D.I. 25, at 13-14. Defendants also propose numerous amendments and alternatives to their proposed brick and mortar scenarios for United States Patent Nos. 7,631,346 (“the ’346 patent”) and 5,961,601 (“the ’601 patent”). *Id.* at 4-5, 9. Defendants rely heavily on those new, alternative, and amended scenarios to argue that the Patents-In-Suit are directed to abstract ideas.

Id. at 4-5, 9, 13-14. Pursuant to D. Del. LR 7.1.3(c)(2), those scenarios “should have been included in a full and fair opening brief.” The purpose behind the prohibition on holding material in reserve “exists, in part, to prevent litigants from engaging in impermissible ‘sandbagging,’ reserving crucial arguments for a reply brief to which an opponent cannot respond.” *Fifth Mkt., Inc. v. CME Grp., Inc.*, C.A. No. 08-520-GMS, 2013 WL 3063461, at *1, n.2 (D. Del. June 19, 2013). IBM seeks leave to respond to Defendants’ new arguments.

Defendants’ Reply brief also relies on cases that were decided after IBM filed IBM’s Opposition To Defendants’ Motion To Dismiss on June 4, 2015. D.I. 23. For example, Defendants rely heavily on *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 2015 WL 3634649, at *7 (Fed. Cir. Jun. 12, 2015), *Internet Patents Corp. v. Active Networks Inc.*, Nos. 2014-1048, et. al, slip op. (Fed. Cir. Jun. 23, 2015), and *Mkt. Track, LLC v. Efficient Collaborative Retail Mktg., LLC*, No. 14 C 4957, 2015 WL 3637740 (N.D. Ill. June 11, 2015). D.I. 25, at 1, 4, 7-10. IBM seeks leave to address those newly decided cases.

Finally, Defendants sought and obtained leave to exceed pages limits for both their opening and reply briefs. D.I. 17. To date, Defendants have submitted 45 pages of briefing and IBM has submitted 30 pages of briefing. D.I. 19, 23, 25. Accordingly, IBM respectfully requests that this Court grant leave to file the 10 page sur-reply attached hereto as Exhibit A, in order to respond to Defendants’ new arguments and case law, and to ensure the Court can decide Defendants’ Motion To Dismiss based on all currently-available information. The parties have met and conferred and Defendants have indicated that they are opposed to IBM’s motion.

Respectfully submitted,

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